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Supreme Court, U.S
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No. 04-1018

In the

Supreme Court of the United States

DLX, INC.,

Petitioner,

v.

COMMONWEALTH OF KENTUCKY; KENTUCKY ENVIRONMENTAL AND PUBLIC PROTECTION CABINET; and THE SECRETARY, KENTUCKY ENVIRONMENTAL AND PUBLIC PROTECTION CABINET, in her official capacity,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONER DLX, INC.

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QUESTION PRESENTED

Does the Eleventh Amendment bar suits under the Fifth Amendment seeking to force states to pay just compensation for unconstitutional takings of private property?

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IDENTITY AND INTEREST OF AMICUS CURIAE

Pacific Legal Foundation (PLF) is the largest and most experienced nonprofit, public interest law foundation of its kind in America. Litigating nationwide since 1973, PLF provides a voice in the courts for thousands of Americans who believe in the principles of limited government, free enterprise, and individual freedom. For more than 30 years, PLF has been litigating in support of the rights of individuals to make reasonable use of their private property. PLF attorneys have been before this Court on three occasions representing individuals whose right to use their property was unlawfully denied by government agencies. *See, e.g.*, *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001); *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725 (1997); *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987). All parties have consented to the filing of this brief.[1]

PLF has a long history of participation in important litigation as amicus curiae, filing briefs in nearly every major real property takings case heard by this Court in the last three decades, including several cases that are now before this Court. *See San Remo Hotel, L.P. v. City and County of San Francisco, California*, Docket No. 04-340; *Lingle v. Chevron U.S.A. Inc.*, Docket No. 04-163; and *Kelo v. City of New London, Connecticut*, Docket No. 04-108. PLF has consistently maintained the position that property owners have a federal constitutional right to cash compensation for a taking. PLF's

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[1] Pursuant to this Court's Rule 37.2(a), all parties have consented to the filing of this brief. Letters evidencing such consent have been filed with the Clerk of the Court.

Pursuant to Rule 37.6, Amicus Curiae affirms that no counsel for any party authored this brief in whole or in part and that no person or entity made a monetary contribution specifically for the preparation or submission of this brief.

Fifth Amendment expertise and litigation experience will provide an additional, valuable viewpoint on the issues presented in this case.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case represents the impact point of two doctrines that have been on a collision course for three decades: Eleventh Amendment Immunity and Regulatory Takings. For while states are sovereigns who "entered the federal system with their sovereignty intact," *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 779 (1991), it is "axiomatic that the Fifth Amendment's just compensation provision is 'designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.' " *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 318-19 (1987) (quoting *Armstrong v. United States*, 364 U.S. 40, 49 (1960)). The question presented by this case is what happens when a state takes property and these two principles collide: Do private property rights yield to the Eleventh Amendment or do principles of immunity yield to the Takings Clause?

Where the Eleventh Amendment applies, states enjoy immunity from all private suits for damages unless it has been abrogated or the state has waived its immunity. This principle of sovereign immunity is so important that the "Constitution never would have been ratified if the States and their courts were to be stripped of their sovereign authority except as expressly provided by the Constitution itself." *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 238 n.2 (1985). Most recently, *Alden v. Maine* clarified that principles of sovereign immunity shield states from private suits for damages in state courts as well as federal courts. 527 U.S. 706 (1999). After *Alden* then, waiver or abrogation of sovereign immunity is

required for all suits in state or federal court unless those suits seek only prospective injunctive relief. *Id.* at 747 (explaining the *Ex parte Young* exception exists to ensure that the "Constitution is to remain the supreme law of the land," despite immunity).

But the Eleventh Amendment does not apply to the Fifth Amendment, and it is unnecessary to examine whether immunity has been waived or abrogated. The Takings Clause demands compensation whenever government takes private property—the compensation requirement is a substantive limit on the state's ability to take property without the owner's consent. The Takings Clause thus provides a unique exception to the states' usual immunity from suit. And while most takings claimants sue local government entities that may not invoke Eleventh Amendment immunity, a growing number of litigants must sue the state itself. These claimants, entitled to compensation by the constitutional text, find themselves precluded from filing suits for compensation in jurisdictions that apply the Eleventh Amendment.

If the Eleventh Amendment does apply to the Takings Clause, it is necessary to examine whether the immunity has been waived by the state or abrogated. The Takings Clause is applicable to the states through the Fourteenth Amendment, which permits the federal government to abrogate state immunity. *See, e.g., Board of Trustees of Univ. of Ala. v. Garrett*, 531 U.S. 356, 363 (2001). And while most abrogation requires a statute, the Takings Clause is self-executing; claims "based on the right to recover just compensation for property taken" do not require "[s]tatutory recognition" but are "founded upon the Constitution of the United States." *Jacobs v. United States*, 290 U.S. 13, 16 (1933). The self-executing nature of the Fifth Amendment thus automatically abrogated state sovereign immunity when it was incorporated through the Fourteenth Amendment.

This analysis, although consistent with this Court's precedents, has been rejected by the lower federal courts. *See DLX, Inc. v. Kentucky*, 381 F.3d 511, 528 (6th Cir. 2004) (citing cases from the First, Fifth, Seventh, Ninth, and Eleventh Circuits agreeing that the Eleventh Amendment bars takings claims in federal court). The result is that property owners cannot invoke the substantive protections of the Fifth Amendment and the state may freely ignore the constitutional condition placed on the use of the eminent domain power.

Without an avenue of redress for takings claims, "all property rights . . . exist only at the whim of the sovereign," a situation clearly at odds with the principles animating the Constitution. *Florida Dep't of State v. Treasure Salvors, Inc.*, 458 U.S. 670, 697 (1982). Because of the importance of this question and the widespread misunderstanding among the courts of appeals, this Court should grant the petition for certiorari and announce that the self-executing character of the Takings Clause compels a unique exception to the general immunity from suit provided by the Eleventh Amendment.

ARGUMENT

I

THIS CASE PRESENTS THE IMPORTANT QUESTION OF WHETHER THE ELEVENTH AMENDMENT'S IMMUNITY FROM SUIT BARS A LITIGANT FROM BRINGING A REGULATORY TAKINGS CLAIM AGAINST THE STATE

A. The Eleventh Amendment Does Not Apply to Takings Claims Because the Compensation Required by the Fifth Amendment Is Not a Remedy but a Constitutional Imperative

The Eleventh Amendment does not apply to the Takings Clause, incorporated against the states through the Fourteenth

Amendment. It is instead a concrete limit on government power to compel the transfer of property. Though commonly discussed in terms of a remedy, the Takings Clause's requirement that private property not be taken without just compensation is just that: a constitutional requirement. It is therefore unnecessary to examine whether immunity has been abrogated or whether the state has consented to suit: the analysis simply is not required.

The phrase "without just compensation" is not the remedial arm of the Takings Clause but a distinct limit on government power. *See* Paul J. Heald & Michael L. Wells, *Remedies for the Misappropriation of Intellectual Property by State and Municipal Governments Before and After Seminole Tribe: The Eleventh Amendment and Other Immunity Doctrines*, 55 Wash. & Lee L. Rev. 849, 870-71 (1998) (explaining that the "central aim" of the Takings Clause "is to limit the 'government's power to isolate particular individuals for sacrifice to the general good' " (quoting Laurence H. Tribe, *American Constitutional Law* § 9-6, at 605 (2d ed. 1988))). The Takings Clause is not "an invitation to sue for payment," but an affirmative limit on state and local power, requiring that they either pay for property or leave it alone. *See* Michael M. Berger & Gideon Kanner, *Shell Game! You Can't Get There from Here: Supreme Court Ripeness Jurisprudence in Takings Cases at Long Last Reaches the Self-Parody Stage*, 36 Urb. Law. 671, 695 (2004). Viewed properly, then, Petitioner DLX does not ask the federal courts to give it a damages remedy for a constitutional violation but simply asks the courts to enforce the Constitution's plain text. Because this text was incorporated directly against the states through the adoption of the Fourteenth Amendment, the Eleventh Amendment has nothing to do with the compensation requirement of the Takings Clause.

Further, "[i]t is a proposition too plain to be contested that the Just Compensation Clause of the Fifth Amendment is

'repugnant' to sovereign immunity and therefore abrogates the doctrine." Eric Grant, *A Revolutionary View of the Seventh Amendment and the Just Compensation Clause*, 91 Nw. U. L. Rev. 144, 199 (1996). The very origins of the notion of immunity—that the government both defines the rights of citizens and determines whether and to what extent citizens may enforce those rights against their sovereign government—is contrary to the idea of self-government, particularly so when "We the People" have expressly declared that government shall not take private property "for public use without just compensation." U.S. Const. amend. V. Put simply, "a taking without payment of just compensation is a constitutional oxymoron." Grant, *A Revolutionary View*, 91 Nw. U. L. Rev. at 200.

But the Sixth Circuit misapprehended the special characteristics of the Takings Clause. The court below recognized that "*First English* makes clear that the Fifth Amendment Takings Clause is a self-executing remedy, notwithstanding sovereign immunity," but found that the Eleventh Amendment bars DLX's claims. *DLX, Inc. v. Kentucky*, 381 F.3d at 527. This analysis assumes that Eleventh Amendment immunity is absolute, but this Court has long recognized that "certain suits for declaratory or injunctive relief" must be permitted, despite the Eleventh Amendment, "if the Constitution is to remain the supreme law of the land." *Alden*, 527 U.S. at 747 (citing *Ex parte Young*, 209 U.S. 123 (1908)). At its core, this limited exception to the Eleventh Amendment for injunctive relief embraces the practical reality that there must be a federal forum available to enforce the plain text of the Constitution lest its protections become meaningless. The Petitioner asks for nothing more here, requesting only that the federal courts enforce the plain text of the Constitution and determine whether the state must comply with the Fifth Amendment's just compensation requirement for taking their private property. After successfully running the *Williamson*

County gauntlet by seeking a state-based remedy for the taking of their property and being denied, Petitioner must be allowed to vindicate a violation of the Constitution's plain text in federal court.

The Sixth Circuit instead adopted a scheme in which a property owner must litigate his federal takings claim in state court and *state court alone*. Though the court below was undoubtedly correct that the Takings Clause abrogates sovereign immunity in state courts, there is no reason for so limiting the abrogation. According to the court below, the self-executing nature of the Takings Clause is strong enough to abrogate sovereign immunity in state court but not in federal court. But where it applies, "sovereign immunity bars relief against States and their officers in both state and federal courts." *Alden*, 527 U.S. at 747. Indeed, the principle that immunity extends to state courts is so central that it was the motivation for this Court's creation of the *Ex parte Young* exceptions. *See Alden*, 527 U.S. at 747-48. In short, there is no principled reason to abrogate state immunity in state court but not federal court.

The Takings Clause applies to the states, and the Takings Clause expressly requires just compensation when government takes private property. Petitioners thus seek a ruling requiring the federal courts to apply the Clause's plain text. In this way, they are similar to a litigant asking the federal courts for relief under *Ex parte Young*: both come to the Court seeking judicially compelled enforcement of constitutional text. The logic and reasoning behind the Eleventh Amendment is inapplicable to the Takings Clause—compensation is a condition of the government's eminent domain power and any taking without such payment is illegitimate. *See City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 717 (1999) ("Although the government acts lawfully when, pursuant to proper authorization, it takes property and provides just compensation, the government's action is lawful solely

because it assumes a duty, imposed by the Constitution, to provide just compensation."). This Court has never made this important but implicit principle explicit, which has resulted in a confused collage of law on the subject in the lower federal courts. The petition should be granted to resolve this important question of law.

B. If the Eleventh Amendment Applies to Takings Claims, Immunity Is Abrogated by the "Self-Executing" Nature of the Takings Clause

If the Eleventh Amendment does apply to Takings claims, the incorporation of the Fifth Amendment through the adoption of the Fourteenth Amendment abrogated sovereign immunity. Even when viewed as a remedy or "damages," then, a lawsuit seeking compensation required by the Takings Clause is nevertheless unencumbered by the Eleventh Amendment. Though states normally enjoy immunity from damages for suit, the Takings Clause does not provide an ordinary cause of action. It is self-executing insofar as it requires no implementing legislation: suits for compensation are founded directly upon the Constitution itself. This self-executing character, as part and parcel of the Takings Clause, was incorporated against the states through the adoption of the Fourteenth Amendment.

1. The Fourteenth Amendment Worked an Important Change in the Application and Enforcement of Constitutional Rights

States generally enjoy immunity from suits for damages in federal court, but this immunity is not absolute. *See Alden v. Maine*, 527 U.S. at 713. The Constitution, as it existed before the adoption of the Fourteenth Amendment, left states with the exclusive power to allow suits seeking damages for a violation of a federal right, regardless of whether that right arose from a federal statute or constitutional provision. *See id.* at 755

(explaining that, before the adoption of the Fourteenth Amendment, the consent of the States was the only exception to the states' immunity from private suits designed to enforce the Constitution); *see also Hans v. Louisiana*, 134 U.S. 1, 14-15 (1890) (upholding a state's immunity from a suit arising under the Constitution). But the adoption of the Fourteenth Amendment transformed the preexisting federal-state balance. Among other things, it imposed a new requirement upon states to refrain from "depriv[ing] any person of life, liberty, or property, without due process of law." *See* U.S. Const. amend. XIV, § 1.

This due process provision incorporated many if not all of the individual rights protected by the federal Constitution and thus bound states by those rights. Kurt T. Lash, *The Second Adoption of the Free Exercise Clause: Religions Exemptions Under the Fourteenth Amendment*, 88 Nw. U. L. Rev. 1106, 1147 n.188 (1994) (discussing the selective incorporation doctrine). That is, "the prohibitions of the [Fourteenth] amendment refer to all the instrumentalities of the state,—to its legislative, executive, and judicial authorities." *Chicago, B. & Q.R. Co. v. City of Chicago*, 166 U.S. 226, 233 (1897). The Fourteenth Amendment's Due Process requirement "recognizes the right of the owner to be compensated if his property be wrested from him and transferred to the public." *Id.* at 236.

To date, most of the rights guaranteed by the Bill of Rights have been incorporated against the states through the Fourteenth Amendment. *See* Daniel E. Troy, *Advertising: Not "Low Value" Speech*, 16 Yale J. on Reg. 85, 109 (1999). As a result, individuals may sue state officers to halt the ongoing violation of a federal constitutional right, the state's immunity from suit notwithstanding. *See Ex parte Young*, 209 U.S. at 159-60 (sovereign immunity does not preclude a suit against state officers in federal court designed to secure prospective equitable relief from constitutional violation). Incorporating the

Takings Clause through the Fourteenth Amendment, worked an important change: It applied the Fifth Amendment's compensation limit to the states eminent domain power and made it a federally protected right.

2. The Takings Clause Abrogates State Immunity Through Incorporation in the Fourteenth Amendment

Even if the Fifth Amendment's just compensation requirement is viewed as a remedy, the Eleventh Amendment still does not bar this suit because the Takings Clause abrogates state immunity through its incorporation under the Fourteenth Amendment. Unlike the Fifth Amendment, other constitutional rights do not provide their own remedy. In fact, the Constitution "refers explicitly to remedies in only two instances": habeas corpus and the Takings Clause. *See The Federal Courts and the Federal System* (Fallon, Meltzer & Shapiro, eds. 2003) (pointing out that the "remedy of habeas corpus is safeguarded" and that the "Just Compensation Clause 'dictates the remedy for interference with property amounting to a taking'—compensation for the impairment of value"). With these two exceptions, the incorporation of all other federal constitutional rights against the states via the Fourteenth Amendment do not by themselves impose a remedy against the states and so waive the states' immunity.

But the Takings Clause is "self-executing." *First English*, 482 U.S. at 315. Because the Clause declares its own redress, a taking of private property for public use must always be remedied by the payment of compensation for the property right taken. *See id.* ("[G]overnment action that works a taking of property rights necessarily implicates the '*constitutional obligation* to pay just compensation.' " (emphasis added) (quoting *Armstrong*, 364 U.S. at 49)). Given its unique characteristics, no congressional abrogation of immunity or state consent to compensation is necessary to enforce the

Takings Clause. The compensation cure is self-evident and self-executing and thus, incorporated through the Fourteenth Amendment, requires the states to pay money whenever they take private property. *First English*, 482 U.S. at 319 ("Where [a] burden [on a property owner] results from governmental action that amounted to a taking, the Just Compensation Clause of the Fifth Amendment requires that the government pay the landowner for the value of the use of the land during this period.").

Because of its self-executing nature, the Takings Clause is an exception to the general framework requiring additional legislative action before state immunity is abrogated. *See id.* at 315 (explaining that "claims for just compensation are grounded in the Constitution itself"). As explained above, governments lack the power to take property unless they provide just compensation. Thus, immediately upon incorporation, the Clause itself abrogated the states' immunity from suit because the Clause brings with it a compensation remedy. Four members of this Court have recognized as much, openly questioning whether immunity "retains its vitality" in the context of the Fifth Amendment, citing to *First English*. *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. at 714 (Kennedy, J., joined by the Chief Justice and Justices Stevens and Thomas) ("Even if the sovereign immunity rationale retains its vitality in cases where [the Fifth] Amendment is applicable, *cf. First English* . . . .").

A necessary corollary to the fact that the federal just compensation requirement is self-executing and fully incorporated is that states must answer suits alleging that they owe compensation for a completed taking. *See First English*, 482 U.S. at 315 ("We have recognized that a landowner is entitled to bring an action in inverse condemnation as a result of '"the self-executing character of the constitutional provision with respect to compensation . . . ."'"). If this were not so, either Congress or the state would have to act before an

individual could enforce the right to damages. In this scenario, the Takings Clause would merely be capable of execution, not "self-executing."

But the Takings Clause *is* self-executing and, as a result, principles of immunity must yield to compensation for a taking. *See First English*, 482 U.S. at 316 n.9 (rejecting the United States' argument that sovereign immunity principles compel the conclusion that the Takings Clause does not provide a damages remedy); *see also Hendler v. United States*, 952 F.2d 1364, 1371 (Fed. Cir. 1991) (noting that, because a federal takings suit is "based upon the constitutional provision protecting property rights, and the provision was considered to be self-executing with respect to compensation, it escaped the problems of sovereign immunity"); *SDDS, Inc. v. South Dakota*, 650 N.W.2d 1 (S.D. 2002) (self-executing nature of just compensation claims overrides state's immunity); *Boise Cascade Corp. v. Oregon*, 991 P.2d 563 (Or. Ct. App. 1999) (same); *see generally* Thomas W. Merrill, *The Landscape of Constitutional Property*, 86 Va. L. Rev. 885, 981 (2000) (citing *First English* for proposition that "the Takings Clause has been held to incorporate a self-executing waiver of state and federal sovereign immunity against claims for monetary compensation"); Garrett Power, Palazzolo v. Rhode Island: *Regulatory Takings, Investment-Backed Expectations, and Slander of Title*, 34 Urb. Law. 313, 324 (2002) (A regulatory takings "claim would not be barred on sovereign immunity grounds because 'the self-executing' nature of the Fifth and Fourteenth Amendments to the U.S. Constitution would override any such claim federal or state governments would have.").

The Fourteenth Amendment incorporated the Takings Clause of the Fifth Amendment against the states, lock, stock, and barrel. Neither this Court, nor any other, has suggested that this provision was partially incorporated. And while only certain provisions of the Bill of Rights have been incorporated

thus far, this Court has never found that the Fourteenth Amendment partially incorporates the constitutional protections that it does import. There is thus no reason to suspect that anything less than entire the Takings Clause, compensation requirement included, was incorporated against the states through the Fourteenth Amendment. This Court should, therefore, grant the petition for certiorari to end the misperception that the Eleventh Amendment is a bar to suits against states for violations of the Fifth Amendment.

C. The Decision Below Adopts a System in Which Federally Protected Property Rights Will Be at Risk of Lacking any Forum for Vindication

If the decision below is left undisturbed and the state is immune from suit for federal takings claims in *federal court*, states may assert next that they are also immune from suit for federal takings claims in *state court*. *See Alden v. Maine*, 527 U.S. at 745 ("We have said on many occasions, furthermore, that the States retain their immunity from private suits prosecuted in their own courts."). As noted above, *Alden* is clear that decades of this Court's jurisprudence are dedicated to the principle that sovereign immunity is equally applicable in state and federal courts. *Id.* at 747-48. The position adopted by the court below—that the Takings Clause abrogates sovereign immunity in state court but not in federal court—is difficult to reconcile with *Alden*. *See DLX*, 381 F.3d at 527-28. In accordance with *Alden* and as explained in section I.A., *supra*, if a federal takings claim may not be heard in federal court without a state's consent, states will argue that a claim may not be heard in *any* court without a state's consent. In such a system, the Takings Clause is robbed of its vitality and reduced to a mere declaration or aspiration of moral government.

As noted above, this Court made clear in *First English* that compensation is the *required* remedy for a taking. *First English*, 482 U.S. at 315 (explaining that "government action that works a taking of property rights necessarily implicates the 'constitutional obligation to pay just compensation'" (quoting *Armstrong*, 364 U.S. at 49)). This was no mere passing mention in *First English* but the result of a nearly decade long jurisprudential parley begun in earnest with Justice Brennan's 1981 dissent in *San Diego Gas & Electric Co. v. City of San Diego*, 450 U.S. 621, 636 (1981), and completed when the *First English* Court adopted Justice Brennan's view in 1987. And while other "postdeprivation remed[ies]" may also be available, *City of Monterey*, 526 U.S. at 712, "the compensation remedy is required by the Constitution" when a taking is alleged. *First English*, 482 U.S. at 316. In earlier cases, this Court made clear that the remedy for takings claims is nearly always "just compensation" and *not* injunctive relief. *Hurley v. Kincaid*, 285 U.S. 95, 104 (1932).

If compensation claims are subject to traditional sovereign immunity principles, however, a claim for compensation could never be filed against a nonconsenting state in federal court. This cruel trap forces a property owner whose land has been taken by the state to seek a "remedy" which forces him out of federal court and arguably precludes him from state court. For any other kind of claim, such a litigant could simply elect to pursue prospective injunctive relief in federal court and avoid Eleventh Amendment problems, but even this avenue is unavailable because he is constitutionally compelled to pursue compensation. Under the scheme adopted by the court below, nonconsenting states are potentially immune from federal takings claims in any forum. Even a litigant subjected to a physical invasion of his property would not be able to press his federally protected rights but would, instead, be forced to pursue whatever remedies, if any, the state may philanthropically agree to provide.

"If a state may not be sued for damages by a private citizen in federal court, and a state may not be sued by a private citizen in its own courts, what recourse does a plaintiff have?" Robert V. Percival, *"Greening" the Constitution—Harmonizing Environmental and Constitutional Values*, 32 Envtl. L. 809, 839 (2002). If the decision below is correct, this is the exact catch-22 that property owners will find themselves subjected to. Normally required to sue for compensation by this Court's decision in *First English* and *Hurley*, they find the doors of the federal courthouse closed. Potentially subject to the strictures of sovereign immunity in state courts, they will find their federally protected rights at risk. Their right to use and retain private property thus becomes wholly dependant on the whims of the Legislature's underdeveloped capacity for accountability and self-restraint. In such a scheme, the Takings Clause is not even a "poor relation" but a forgotten relic. *Dolan v. City of Tigard*, 512 U.S. 374, 392 (1994). This result is inconsistent with the primacy of individual rights in property and with 200-plus years of this Court's Takings Clause jurisprudence.

CONCLUSION

At a minimum, it is unclear whether this Court's decisions on the self-executing nature of the Takings Clause abrogate state immunity in federal court, state court, neither, or both. As the Sixth Circuit noted in the decision below, legal scholars and this Court's dicta suggest that the question remains open. *See DLX*, 381 F.3d at 527 (noting that leading commentators suggest this question is an open one). This petition thus presents an important question: whether the principles behind the Takings Clause must give way to the principles behind the

Eleventh Amendment. For the foregoing reasons, this Court should grant the petition for certiorari and reverse the decision of the court below.

DATED: February, 2005.

Respectfully submitted,

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